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Via Electronic Mail: [harborcomments@epa.gov](mailto:harborcomments@epa.gov)

U.S. Environmental Protection Agency, Region 10  
ATTN: Harbor Comments  
U.S. Environmental Protection  
Agency 805 SW Broadway, Suite 500  
Portland, OR 97205

Re: Calbag Metals Co. Comments on Portland Harbor Superfund Site Proposed Plan

Dear EPA Region 10,

Calbag Metals Company (Calbag) appreciates the opportunity to submit these comments on EPA's Proposed Plan for the Portland Harbor Superfund Site (the Site). Calbag is a local small business - a scrap metal recycling company founded in Portland in 1943. Calbag currently employs 48 area residents (and historically has employed between 48 and 78 consistently), paying them wages well above the Portland median wage, including generous benefits, for both union and non-union employees. Calbag provides these primarily full-time jobs to a racially diverse group, 85% of whom do not have a college degree; 10-15% do not have high school diplomas.

Calbag recycles ferrous and nonferrous scrap metal. Over the past five years, annually it has processed and shipped over 100 million pounds of nonferrous scrap (aluminum, copper, stainless steel and brass) and shipped 50,000 tons of ferrous scrap. Most of this scrap is generated in Oregon; after processing, approximately 50% of it remains in the United States, and 10% in Oregon specifically. Calbag's success as a small business in turn supports other small business - smaller scrap dealers, trucking companies, shipping lines, parts suppliers and others. Like many other Oregon businesses, Calbag directly and indirectly depends on Willamette River shipping to conduct its business.



Calbag's overarching concern with the Proposed Plan is that, if a Record of Decision is issued that mirrors it, litigation appears highly likely. As a small business and PRP,<sup>1</sup> Calbag does not want to be dragged into years of litigation or, at a minimum, face long term delay in resolving its liability at the Site because PRPs with significant responsibility refuse to implement the remedy. As it stands, multiple components of the Proposed Plan and assumptions on which they rest appear technically and factually unsupported and thus legally arbitrary and capricious. Unless these are addressed and the ROD diverges from the Proposed Plan in several significant components, the ROD will be ripe for legal challenge.

Calbag understands that any remedy at the Site, even one fully supported by facts and science, will be extremely costly and potentially business-altering or business-ending for small companies like Calbag, which nobody considers to be a major player at the Site. There is a real and substantial risk that local small business PRPs will be bankrupted by the even a small share of the cleanup costs. EPA needs to ensure that the ROD does not put the future of Portland's economy at risk by adopting a remedy that achieves a reasonably similar amount of risk reduction but at twice the cost of other alternatives.

The point of these comments is not to advocate for an inexpensive cleanup, but rather to plead with EPA to take a second and closer look at the available data, including its own Baseline Ecological Risk Assessment (BERA) and Baseline Human Health Risk Assessment (BHHRA) and insure that the ROD selects a remedy that is both scientifically justified and cost effective, as well as flexible. This will allow implementation to begin immediate because performing parties will have the confidence, certainty and flexibility necessary to move forward with pre-remedial and remedial design.

A ROD derived from the existing Proposed Plan and Feasibility Study will create extreme long term uncertainty not only for small business PRPs, but all small businesses operating in and around the Harbor generally. The uncertainty and lack of confidence in a ROD based on the current Proposed Plan also will prevent PRPs from entering into settlements to fund the costs of remedial design and implementation. Even where performing and small or *de minimis* PRPs both are amenable to cashing out liability, the uncertainty inherent in a ROD that mirrors the Proposed Plan, and the likelihood of litigation, will prevent such settlements, wasting resources that otherwise could go toward cleanup.

In addition to issuing a ROD that is not arbitrary and capricious and that relies on all existing data and clear analysis of the comparable costs and benefits of each alternative,

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<sup>1</sup> Calbag received a General Notice Letter from EPA regarding potential liability for response costs at the Site resulting from historical stormwater discharges via the City of Portland sewer system.



establishing operable units at the Site also would alleviate uncertainty, decrease the risk of litigation and encourage early implementation and settlement for at least some of the units.

These comments identify only a few of the many unsupported conclusions and inconsistencies in the Proposed Plan and the Feasibility Study that raise Calbag's concerns about the reliability of a ROD that mirrors the Proposed Plan. EPA has the means and knowledge to insure these concerns are addressed in the ROD.

### **EPA Should Consider & Account for All Current Data**

There is substantial, relatively recent evidence that contaminant characteristics (including concentration and depth) at the Site have changed significantly and for the better since the Lower Willamette Group's Remedial Investigation.<sup>2</sup> For example, 2012 small mouth bass data (which Calbag understands was provided to EPA) demonstrate that some areas of the Site already are recovering to a degree that may make active cleanup unnecessary. Given that EPA appears to have assumed that a PCB Preliminary Remediation Goal (PRG) of 9 ppb can be reached in 30 years, this additional data may demonstrate that surface sediments at the Site will be at or near equilibrium levels by the time of construction of the remedy in any given area, obviating the need for significant intervention at many parts of the Site.

There also is no indication in the Proposed Plan or Feasibility Study that EPA considered 2014 PCB sediment data that Calbag understands was provided to it and may reflect similar, significant positive changes in the Site's contaminant characteristics. There may be other data provided to EPA of which Calbag is unaware. Whatever the source, so long as data is reliable, EPA should consider it in choosing a remedy for the Site or explain explicitly why each data package is being disregarded. It will be difficult for any interested parties, let alone PRPs funding the remedy, to trust an outcome that omits known relevant data without acknowledgment and explanation.

### **EPA Must Fully Analyze and Communicate More Clearly Regarding Fish Consumption Goals and Related Cost Effectiveness**

Although the Proposed Plan or Feasibility Study do not admit it, following remedy implementation, it appears that fish advisories will remain necessary in the Lower Willamette, because the Site remedy will not address mercury contamination. Thus ongoing mercury advisories issued by the Oregon Health Authority will continue to be necessary and will limit

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<sup>2</sup> See, e.g., "Sediment Sampling Data Report, Portland Harbor, Portland, Oregon" prepared for de maximis Inc., (Kleinfelder, May 11, 2015).



consumption of fish from the Site regardless of the post-cleanup PCB levels in fish tissue. To the subsistence fisher (or any consumer of fish caught from the Site), there is no practical difference between a fish advisory for mercury or PCBs. Given that decreasing the risk of fish consumption appears to be the main driver of remedy selection, and public concern over fish consumption is high, it is misleading to omit discussion of the ongoing need for fish advisories and the role, if any, that fact plays in EPA's remedy selection.

Extensive evidence from other sites as well as the LWG's food web model in its 2012 Draft FS suggests that fish tissue PCB concentrations will temporarily increase for a period of years during and following dredging of contaminated sediments.<sup>3</sup> As a result, fish consumption risks will increase significantly during construction and will persist for several years after construction is complete, so fish consumption advisories during these periods will be more strict than currently exists. Therefore, cleanup alternatives involving longer and more aggressive construction activities are likely to decrease the amount of fish meals that can be consumed during and for some time after construction. The Feasibility Study and Proposed Plan do not discuss this trade off or calculate the net value of acceptable fish meals over time under each alternative. For example, EPA has not articulated any comparison between Alternatives B and I in terms of which achieves a greater number of reduced risk fish meals by post-construction, within 30 years, or within any other time frame. Given the longer construction time for Alternative I, one would expect to see a longer period of time in which significantly decreased fish consumption can occur. It appears that there is only a slight difference (perhaps less than half a fish meal per year for children) in the ultimate outcome but at significantly different costs (and community impacts) to obtain those outcomes.

If increasing the number of meals sensitive populations (such as subsistence fishers and children) can eat without significant risk is the driver of EPA's remedy selection, then EPA should articulate and consider the incremental fish consumption risk reduction obtained by each of its alternatives, the estimate of the time it takes each alternative to achieve the goal, and compare the cost per meal of doing so.

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<sup>3</sup> See LWG 2012 Draft FS, Sections 6.2.7.3 and 8.2.2.4; "Dredging Processes and Remedy Effectiveness: Relationship to the 4 Rs of Environmental Dredging" (Bridges, et al. 2010); "Integrated Environmental Assessment and Management" (2010 SETAC (February 10, 2010)); IRTC p. 181; and "Sediment Monitored Natural Recovery Case Studies" Presentation (Carl Stivers and Clay Patmont of Anchor QEA; Battelle Eighth International Conference on Remediation and Management of Contaminated Sediments (January 12-15, 2015)).



### **EPA Should Revisit Its Cost Analyses of the Alternatives**

The basis for EPA's estimated costs of each alternative lacks detail and likely significantly understates the costs. This is problematic as it prevents a true comparison of the alternatives and discourages PRPs from committing to cleanup and/or settlement of liability because they are left with a high degree of uncertainty about the cost. It also creates suspicion. Calbag urges EPA to reevaluate the costs and assumptions used to evaluate those costs, and to be more transparent regarding how its ultimate cost estimates for the alternatives are derived so that performing and settling parties can have faith or trust in the estimate and confidently rely on it as a basis for settling their obligations and/or performing remedial design and implementation.<sup>4</sup>

EPA's cost estimates for the alternatives generally are unjustifiably optimistic. EPA relies on overly optimistic estimates for dredging production rates and project durations for dredging and capping. Its estimates for contingencies, agency oversight, project management, construction management, water quality control structures and fees for capping on state lands are either absent or unsupported. EPA also adopted unrealistic assumptions about dredge and cap production rates and volumes and remediation waste processing and transfer that led to excessively low cost estimates for those elements. Calbag is aware that several sophisticated environmental consulting firms independently evaluated the cost of EPA's preferred Alternative I and each uniformly found a more realistic estimate to be hundreds of millions of dollars more than EPA's cost estimate of \$811 million, up to double that amount.<sup>5</sup>

Properly estimating these project costs provides the basis for conducting the necessary cost effectiveness analysis that ultimately leads to remedy selection, and provides the support necessary for confidence in the end result, decreasing the risk that PRPs will refuse to complete the remedy and increasing the likelihood of a determination that the choice of remedy was arbitrary and capricious.

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<sup>4</sup> Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA, page 2-10 (October 1988).

<sup>5</sup> NERA Economic Consulting, "Economic Impacts of EPA Portland Harbor Superfund Remedial Alternatives (August 2016); Lower Willamette Group, "Cost Evaluation Memorandum" (August 29, 2016). Calbag understands that EPA has received both of these reports.



**The Lack of Clear Cost Effectiveness Analyses Increases the Risk of Litigation and an Arbitrary and Capricious Remedy Selection**

CERCLA requires that EPA determine that the selected remedy is cost-effective.<sup>6</sup> EPA must compare the cost to the effectiveness of each alternative individually in relation to one another.<sup>7</sup> The preamble to the National Contingency Plan (NCP) provides: “[i]n analyzing an individual alternative, the decision-maker should compare . . . the relative magnitude of cost to effectiveness of that alternative. In comparing alternatives to one another, the decision-maker should examine incremental cost differences in relation to incremental differences in effectiveness.”<sup>8</sup> Furthermore, “if the difference in effectiveness is small but the difference in cost is very large, a proportional relationship between the alternatives does not exist,” and “[t]he more expensive remedy may not be cost-effective.”<sup>9</sup> “Cost-effectiveness is determined by evaluating the following three of the five balancing criteria [] to determine overall effectiveness: long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness. Overall effectiveness is then compared to cost to ensure that the remedy is cost-effective.”<sup>10</sup> “A remedy shall be cost-effective if its costs are proportional to its overall effectiveness.”<sup>11</sup>

An appropriate alternatives evaluation must fairly and carefully weigh the costs against the benefits of the alternatives both individually and relative to each other. This evaluation should also demonstrate how the alternatives’ dollar costs are proportional to their effectiveness in reducing risk. The NCP requires that, “[e]ach remedial action selected shall be cost-effective, . . . A remedy shall be cost-effective if its costs are proportional to its overall effectiveness.” EPA’s comparison of alternatives should explicitly assess each of the FS criteria contained in the NCP at 40 CFR §300.430(e)(9) in order to perform a complete cost effectiveness analysis. EPA must be conscious of the importance of this analysis when the health of Portland’s business community is at risk. Ensuring that the costs invested in performing the remedy efficiently achieve risk reduction criteria will allow for both a clean and healthy river while maintaining a strong local economy.

EPA’s Proposed Plan and Feasibility Study omit quantitative and detailed short term and long term effectiveness evaluations and repeatedly underestimate the costs and durations of the alternatives. EPA’s limited cost effective analysis in the Proposed Plan is insufficient to meet

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<sup>6</sup> 42 U.S.C. § 9621(b).

<sup>7</sup> NCP Preamble, 55 FR 8728.

<sup>8</sup> 55 Fed. Reg. 8728.

<sup>9</sup> *Id.*

<sup>10</sup> 40 C.F.R. § 300.430(f)(1)(ii)(D).

<sup>11</sup> *Id.*



the standards set forth in statutes, regulations and guidance and risks a determination that its ultimate remedy selection is arbitrary and capricious.

### **Indirect Costs and Impacts to Business**

As part of its cost effectiveness analysis, EPA should more explicitly articulate the indirect costs of the remedy to the community, including businesses. The Proposed Plan fails to account for community impacts from multi-year dredging, capping, and transload operations on the river (e.g., recreational uses, light, noise, etc.); truck traffic and potentially train traffic in evaluating its alternatives. The placement of obstructions to the navigation channel and the requirements to move the dredges and their support vessels and structures to allow for the passage of ship traffic on an ongoing and continuous basis risks slowing or stopping commercial traffic on the river (or delaying the remedy). EPA's preferred Alternative I calls for significant dredging to take place, every day for four months per year, for seven years (because this time frame is based on overly optimistic assumptions about dredge production and related factors, even Alternative I is likely to take much longer than seven years). These dredging operations will restrict the time required for, and the predictability of, shipping within Portland Harbor, which could cause shippers to choose different ports during the course of the project and will certainly increase costs. For businesses that rely on shipping, this could significantly affect their operations for years on end. EPA's Proposed Plan does not truly analyze these effects of any of the alternatives or compare them in a meaningful way across alternatives, making the cost effectiveness determination unreliable and biased.

The Proposed Plan and recent reports in the local media suggest that EPA is considering severing its longstanding agreement with the Oregon Department of Environmental Quality (DEQ) under which DEQ is responsible for upland source control. EPA would then take control of source control efforts. Calbag objects to this approach as it wastes considerable resources and experience with no justification. DEQ has spent years working with businesses in and near Portland Harbor to control stormwater and other releases to the river, with major success. These companies, including Calbag, have invested significant time and expense working with DEQ to meet goals and implement specific technologies, as well as to build constructive relationships. DEQ retains a committed and knowledgeable staff. Abandoning the momentum, relationships and ongoing progress by DEQ would be short-sighted and likely would cause delay in further source control efforts. Calbag urges EPA to further consider this issue and make every effort to continue to engage with DEQ both for upland source control and in any other way DEQ can provide oversight and assistance.



### **Length of Time to Construction and Completion**

The Proposed Plan is unacceptably vague regarding the length of time between issuance of the ROD and commencement of construction of the remedy. EPA provides vague estimates by reference to a “Year 0” but does not articulate what must occur before or after Year 0 and how long those activities will take. For example, it is unclear whether entering into consent decrees, initial conditions sampling, remedial design (and any additional investigation), construction of a material handling facility and construction mobilization occur before or after Year Zero and how long each will take. These activities could significantly lengthen the time to construction commencement and thus the time to achievement of the remediation goals. In turn, this information may affect the comparison of effectiveness of EPA’s alternatives. EPA should identify a realistic process and timeframe for implementation of its alternatives that includes the time prior to construction. This is another factor providing confidence and greater certainty in the remedy that PRPs must perform or contribute toward, thus increasing the likelihood of settlement and entry into consent decrees.

### **EPA Should Identify Operable Units to Encourage Earlier Remediation and Settlement**

Use of operable units at the Site would allow some units to begin remedial design and remedial action much sooner than if the Site remains a single unit that must be addressed uniformly before any remedy implementation can occur. EPA does not mention operable units in the Proposed Plan, but it is a common practice in this Region and across all EPA Regions; moreover, the Proposed Plan’s use of “sediment decision units” paves the way for identification of operable units.

A decision to use operable units at the Site is supported by the National Contingency Plan. The Preamble to the NCP recognizes the use of operable units as “long-standing policy” that allows earlier responses at portions of a site, rather than requiring “one consolidated response action” and that allows EPA to “effectively manage site problems” and “expedite the reduction of risk...”<sup>12</sup>

The NCP further provides:

(ii) *Program management principles.* EPA generally shall consider the following general principles of program management during the remedial process:

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<sup>12</sup> 55 FR 8666, 8704-05.



(A) Sites should generally be remediated in operable units when early actions are necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate given the size or complexity of the site, or to expedite the completion of total site cleanup.<sup>13</sup>

Dividing the site into operable units would allow EPA and performing parties to implement cleanup in areas where more information exists on a much shorter time frame than will be required at areas where less additional sampling and investigation need to occur. This benefits everyone as it results in a cleaner river sooner.

## **Conclusion**

The Proposed Plan creates significant uncertainty in the ultimate cost and timing of the Portland Harbor cleanup, which in particular harms small businesses like Calbag. The Plan and the Feasibility Study on which it relies contains inaccurate cost assumptions and estimates, and is not transparent regarding the comparison of the cost and benefits of the alternatives. It provides confusing and inaccurate estimates of the time frames for remedial investigation and design. The failure to properly evaluate and compare the alternatives, including specifically their long term effectiveness, again creates significant uncertainty. The Proposed Plan omits the use of operable units that not only are common at large and diverse sites such as this one but also would facilitate faster remedial design and implementation, and settlements.

Calbag and other PRPs ready to resolve their alleged liability (or, for certain PRPs, to enter consent decrees and perform the remedy) cannot rely on a ROD that mirrors the Proposed Plan to evaluate whether they can or should contribute to paying for cleanup and know that what they are paying for will be successful and final. The uncertainties and flaws in a ROD that mirrors the Proposed Plan create a huge risk of unilateral orders and litigation, both of which subject small businesses to outsized impacts. Addressing these issues now will provide greater certainty and predictability, encouraging PRPs to cooperate in funding and conducting cleanup, and also makes for a stronger ROD more likely to hold up under the scrutiny of courts.

Calbag looks forward to a substantive response from EPA to these comments, and more importantly, looks forward to and sincerely hopes that EPA will engage sincerely and in good faith with all comments received, taking the time and making the effort to modify the Proposed Plan into a ROD that complies with relevant law and guidance and avoids charges of

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<sup>13</sup> 40 C.F.R. §300.430(a)(1)(ii).



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arbitrariness and capriciousness. It is in EPA's, PRPs' and the community's best interests to achieve a legally and technically justifiable ROD.

CALBAG METALS CO.

  
Warren Rosenfeld, President